PANEL DISCUSSION I: UNDERSTANDING IMMIGRATION: SATISFYING *PADILLA*'S NEW DEFINITION OF COMPETENCE IN LEGAL REPRESENTATION

Jennifer Chacón
Christopher Lasch
Yolanda Vázquez

MS. HARTILL: We have our panelists, Jennifer Chacón, Yolanda Vázquez, Christopher Lasch. All of them have researched in the area of immigration law and its connection to criminal law.

Jennifer Chacón received her J.D. from Yale Law School and is now a professor at the University of California, Irvine School of Law.

Yolanda Vázquez is a professor at the University of Cincinnati College of Law, and she helped on the *Padilla v. Kentucky* case.

Christopher Lasch received his J.D. from Yale Law School and now teaches at the University of Denver's Sturm College of Law.

This morning we're pleased to announce Paula Schaefer as the moderator. She's an esteemed professor here at the University of Tennessee College of Law.

So without further ado, I'll introduce Jennifer Chacón.

JENNIFER CHACÓN: Good morning. It's a real privilege to be here, and I wanted to take a moment to thank the university for having us; the Dean, for his gracious welcome; and also the many journals who are co-sponsoring the event. I appreciate the support that they've given us, and particularly a shout-out to Katie, who has been just a tremendous guide to our experience and a never ending stream of useful emails that got us where we were supposed

to be and has just been great. So thanks to everybody for making this so easy for me.

I am basically going to give a little bit of a general overview about how we got to *Padilla* and what happens now. And then my co-panelists are going to take it from there and delve into some of the specific issues that *Padilla* raises for practitioners. And then we're hoping to have a fair amount of discussion and make sure that our comments are responsive to your interest and your questions in the coming hour. So I'll talk for about fifteen minutes just to provide a little bit of overview about how we got where we are and what we can expect I think in the near future, at least, with regard to this merger of the criminal and the immigration world. I really appreciated the world's colliding slide. That was kind of emblematic I think of how particularly criminal counsel saw the events leading up to it and its ramifications.

I've taught immigration law in the law school setting now for nine years, and I also teach criminal law to first-year students. And I routinely tell my first-year students who are entering criminal law, "You're living in California, if you're interested in criminal law, whether that be on the defense side or the prosecution side, you really should take an immigration class." I actually think it's really important. It's become sufficiently important. You have a sufficient number of non-citizens who are in the system, and the kind of interwoven consequences are unavoidable. So it is something that I tell my students. It's a little bit daunting, I think in part, because, as we've been told, the immigration code is ridiculously complex, unnecessarily complex, and that in some ways raises challenges. And of course, it's federal and doesn't completely map on what happens at the level of state practice, creating additional complications. And we'll talk about all of those things.

But I do think it's important to have an awareness of what's happening in the immigration world, and hopefully, we can kind of talk about some of those issues today.

So I wanted to just start by talking a little bit about the "how we got here." And in a way, the *Padilla* decision navigates some of that for us. You see the discussion in the majority's opinion about how the nature of the relationship between immigration law and criminal law has changed fairly gradually over the past few decades. In the past, kind of certainly throughout the nineteenth century and into the early twentieth century, there really weren't immigration consequences to criminal violations. So you had this immigration law on the books. You had at least some type of prohibitions on entry. It started in 1875 really. But you didn't have immigration consequences to criminal activity that occurred within the United States really until 1917, and even then, it was very, very limited. So only happening in a few situations of crimes involving moral turpitude. There were pretty strict limits on how long after somebody entered those that the consequences could actually be applied. So by and large, there really wasn't much overlap between the way immigration law functioned and the criminal law. All of this really started to change, and it changed radically, I would say, beginning in the late '80s and proceeding through the mid-'90s. At that time, you had a series of changes to the law that really caused a merger between the immigration law sphere and the criminal law sphere. Because in a series of moves in revising immigration law, Congress attached all manner of immigration consequences to a wide variety of criminal convictions. And so they started out kind of in the height of the war on drugs period by attaching immigration consequences to drug crimes and extended that to a laundry list of other offenses.

And probably most notably, and this was singled out in the comments earlier this morning, developed a very expansive definition of aggravated felony that had severe consequences in the immigration world. So aggravated felony sounds bad. It can be abstract, and many of them are. But Congress has so expanded the list of crimes that

constitute aggravated felonies that the old saying now goes that they need be neither aggravated nor felonies to fit into this category, so you have anything that — you have crimes that in some cases could be state misdemeanors but that will trigger the consequences of aggravated felonies. And the consequences of aggravated felonies are severe. And I'll talk a little bit more about kind of what that looks like in a minute. But essentially the first point I want to emphasize is that for a broad array of criminal convictions and a much broader array of criminal convictions than you might think, there are immigration consequences that follow. So that's point one, which is almost any criminal conviction should put you on alert that there may be criminal consequences. And that's true whether you're talking about misdemeanors or felonies, it's true whether you're talking about state violations or federal.

The second major point that I think is important to make is that, in those changes stemming from '88 to '96, and particularly '96, the changes in the law really eliminated a lot of discretion that immigration officials have to mediate or moderate the impacts of the immigration consequences in criminal convictions. So if you have an aggravated felony, if you are charged with and convicted of something that qualifies as an aggravated felony, there is really no room for discretion no matter what the equities of the case might look like otherwise. And this is different from what the law looked like in the 1996 when there was a possibility for cancellation of deportation in cases where there might be sympathetic facts like the ones that Mr. Padilla presented with. So a lot of the discretion is gone, which means that, once that criminal conviction has attached, there's no going back once somebody is in the immigration pipeline, and that means that it's much more important to be aware and cognizant on the front end of the immigration consequences. Because no matter how sympathetic a person might look, no matter how long they lived in the United

States, those kinds of equities aren't going to be taken into account in the deportation proceedings.

I think the other thing that's important to flag is that a lot of people have tended to assume that these consequences apply and flow primarily to individuals who are present without authorization. And this, I think it gets it exactly backwards. Individuals who are present without authorization are removable because they are present without authorization, the criminal consequences may in some ways be less significant to them although it raises a host of issues about their possibility of return. But where criminal consequences often surprise people, your thinking is like Padilla's, where you have a long-time lawful permanent resident or people who are otherwise authorized to be here who seem to live here in all meaningful sense of the term but who become permanently deportable and permanently barred by virtue of criminal convictions.

So these are the ways in which I think the criminal law has really merged with immigration over the past twenty years or so, making it really important for individuals to be aware of the possible immigration consequences of any criminal conviction or any that the client undertakes.

I think the second point that should be made about this is, if we were talking about a small number of people kind of going into the deportation system, maybe that wouldn't be that significant, but one other thing that's changed, particularly over the past decade, is the degree of enforcement of immigration law in the country. So this has been kind of a theme of common observations, and I think it's worth stressing, since 2003 with the reorganization of the immigration bureaucracy and with the placement of the immigration agencies under the umbrella of the Department of Homeland Security, there has been a massive increase in resources dedicated toward immigration enforcement to the tune of fifteen to twenty billion dollars a year spent on immigration enforcement issues at this time. And so what

that means is you have large law enforcement agencies, including the Immigration and Customs Enforcement Agency, that are dedicated to not only enforcement at the borders but interior enforcement. And what this means, of course, is that large numbers of people who are here who have been present for long periods of time who might in the past not have come to the attention of the immigration bureaucracy have a much greater likelihood of actually coming to the attention of the immigration bureaucracy. And added to this is a point that was made earlier, increased information shared between the federal government and state governments and better databases, which means that individuals with criminal convictions are more likely to be identified in various proceedings. So for all of these reasons, you have more immigration enforcement, a more accurate understanding of the records of immigration coming into the system, and once they're in the system, decreased discretion to deal with the potential consequences of this on both sides. And that decreased discretion applies not just to immigration officers but also to judges. In the past, in the early days of immigration law, looking at the early twentieth century, judges had the discretion when they sentenced people in criminal court to make a determination that those individuals should not be subject to deportation. So the judge who sat in judgment on the crime could make a call about whether this should also have immigration consequences, and that, of course, is not the case anymore either. So all around, once you're in the system, the degree of discretion is really limited.

So those are kind of all reasons in which I think we're seeing more of this linkage between criminal and immigration. And the final reason that I'll flag that I think is important that a later panel will be talking more about is because there's a great deal more state and local involvement in the enforcement of immigration laws, both under formal programs like the 287(g) program, which I think is the

specific topic of the upcoming panel, but also informally-led, individual law enforcement agencies, who decided for whatever reason that immigration enforcement is a priority with them and who accordingly select and profile potential suspects when they think there's a likelihood that they might also be immigration violators. So you have a lot more enforcement on the ground, not just because there's a lot more federal resources for the immigration enforcement but also because states and localities in a variety of guises are also taking a role in immigration enforcement. So consequently, many more people have come into the immigration pipeline by the initial point of entry of the criminal justice or criminal law enforcement system.

So that's the crim-im merger that people talk about, sometimes refer to it as crimmigration, and it's been a phenomena of the past really fifteen years. A little bit more than that but really kind of ramping up over the past fifteen years.

Padilla is in some senses a response to this and also a response to sort of the formalistic distinction that exists in the law between deportation, which is viewed as civil, and the criminal sphere. So *Padilla* comes against a background of a long-standing line of case law that says that deportation in itself is not a criminal consequence. This, obviously, has huge implications for people in removal proceedings because it means that the standard criminal procedural protections that would apply in a criminal trial don't apply in a removal proceeding. You're not entitled to counsel at the government's expense, and things like detention, incident removal is not viewed as incarceration with all of the protections that that would entail. So you have this sphere of removal and detention, incident to removal that exists in the civil universe. And then you have the criminal world, criminal convictions, which may and in many cases do trigger immigration consequences in the civil sphere. And so as the *Padilla* case makes clear and as the comments

earlier made clear, the immigration consequences of the criminal conviction are viewed as collateral or were viewed as collateral as a collateral consequence of the initial criminal conviction but not in and of themselves criminal and, therefore, not necessarily covered by the same laws and guidelines that provide for procedural protections in the criminal sphere.

Padilla, in some senses, acknowledges the fictitiousness of this boundary without totally dismantling it. So it is, I think, a curious feature of the *Padilla* decision that it doesn't say it is a requirement of defense counsel to provide information on all collateral consequences. They don't want to go down that road; they very clearly don't want to go down that road. And so the road that they take is to instead say that there's something peculiar about immigration law. And the comments from both of the earlier speakers highlight the kind of uncomfortableness of that position. But it is true that, for some, immigration consequences are probably more important than the criminal conviction itself, but it might also be true for a sex offender, who has to then go on the registry and can't live or work in certain places, that those collateral consequences might also be more consequential than the criminal conviction itself. The right to vote might also be more consequential. If it involves a professional license for somebody whose profession is invocated by their criminal conviction, that might also be more important. So there is something uncomfortable in some ways about the distinction that the Court carves between deportation and everything else. That said, I think they were looking for a way to deal with the severity of immigration consequences for criminal convictions in the post-1996 world. You are dealing with a situation where there is no opportunity for discretion. This is in some ways an almost unique feature of immigration law. And so if there is mis-advice, there's unfortunately no

way to deal with that mis-advice once the ball gets rolling on deportation.

And so you have this sort of a hybrid decision, which basically says that it is true that there are limitations on what counsel is required to do with regard to collateral consequences. But these are not classic collateral consequences, there's something different about immigration, and it can consequentially misadvise in this context. And even no advice in this context constitutes ineffective assistance of counsel. And we'll elaborate I think a little on that in the upcoming discussions.

What then is required by *Padilla*, well, obviously, I leave that a little bit to be fleshed out by my co-panelist, but I do think there are a couple of points that I want to make. And point number one is it obviously becomes the prerogative of everyone who is dealing with a criminal defendant to identify what their citizenship and immigration statuses are. So if it's not one of the first questions, it certainly should be one of the questions, where-were-you-born question that then leads to information about potential citizenship status and potential immigration status. Just two words on this that I want to stress; one is that citizenship status is never ever as clear as we think it ought to be in many of these cases. I've been astounded at the number of people who find out that they are citizens in the course of deportation proceedings, so never take citizenship as sort of a given. It's not as transparent or easy as we might think, particularly when we're talking about establishing a citizenship, citizenship they have acquired by virtue of their parents' citizenship status. So it's something to be taken not at face value. And immigration history I think also is something not to be taken at face value. People often don't know their own status, and they certainly may not know about the potential immigration options for them. A criminal defense attorney may be the first lawyer that they've really ever talked to about their immigration status

and potential avenues of relief. So immigration status is also not as clear or transparent as one might hope.

The immigration code is arcane, it looks a lot like the tax code, it kind of requires that sort of approach. It's a mess. And so I think it makes it rather daunting for some people to think about advising on these consequences. That said, and I heard this stressed, I think it's important to re-stress the point that is made in a publication called *Cultural Issues in Criminal Defense*. Immigration is not rocket science. It's hard, it's complex, it's strange, it's bizarre, and it's counterintuitive, but it's not rocket science. And it is something that we can figure out, and I hope that part of our discussion can be about the best practices and how to figure it out.

Where I want to close today is really talking about what's next. Someone talked about the possibility that there might be some sort of comprehensive immigration reform, or I'll just take comprehensive right out of it because it won't be comprehensive whatever it is. There may be some kind of immigration reform that happens in the next year or so, and so we might ask the question of what the implications of that are or would be for *Padilla* obligations going forward. And I think the answer is that, even if you get immigration reform, it won't be comprehensive in any meaningful sense, and it won't eliminate these kinds of burdens and obligations and professional requirements that *Padilla* lays in place. And I'll tell you a few reasons why I think that's true.

Reason number one is the immigration code will not be simplified. I don't think Congress has the stomach, the heart, and maybe the head for actually revising the immigration code such that it will read in a sensible way that would be easily understandable to your average non-citizen or even your average citizen attorney. So I think that we can expect that the immigration code will continue to be what it is, which is kind of an arcane statute that cross references itself in confusing and sometimes contradictory

ways. I don't think it will be cleaned up. So we'll still have a very confusing body of immigration law after immigration reform happens.

The other thing that we'll have after immigration reform happens — well, two other things. One is, we'll have a group of people who appear to be eligible on their face for some kind of legalization, normalization, but they actually have convictions or other criminal issues in the past that are going to close that path for them. And the process of the normalization or legalization will bring them to the fore. So I think we'll see a group of people who may be kind of flagged for possible removal as a consequence of this, and that's just something that we should be aware will happen.

The other thing that we'll see is individuals who just are not eligible for legalization or normalization as a consequence of this packet, no matter what this packet is. There will be a substantial number of those people. And those individuals I think will be subject to heightened surveillance and increased enforcement in the wake of any immigration reform package. In fact, Congress is very clear about that border security is a prerogative, border security is a trigger for legalization, and that means more enforcement before you get any kind of legalization. So that means more people in the pipeline potentially who have criminal convictions and who are possibly removable for their criminal convictions. So the takeaway from this is we can expect to continue to see, even in the wake of immigration reform, these issues to remain on the plate.

And I think the final point I want to make, there's been brief mention of *Chaidez* made, and my co-panelists will elaborate on the significance of *Chaidez*. One possible way to read *Chaidez*, which says that *Padilla* is non-retroactive, obvious to say, is that anyone whose plea kind of is pre-March 2010 is sort of outside the *Padilla* universe, you don't need to worry about arguments around

effectiveness or mis-advice or lack of advice in the pre-March 2010 world. And I don't think that's right either. And I think in particular things like mis-advice probably may still be viable claims even for individuals whose pleas were entered into prior to the March 2010 universe, and there may also be other avenues for successful challenges to the advocacy of counsel in those pre-March 2010 days, depending on what stage the ineffectiveness of counsel claims can actually be made. So we can talk a little bit more about that. But the bottom line is, I think *Chaidez*, although it closes the door on some pre-March 2010 claims, it doesn't entirely shut the door on evaluating the efficacy of those particular pleas, and so it's important to recognize that 2010 doesn't quite stand as the staunch beginning period necessarily of everything that might relate to effective information about immigration consequences in the criminal plea process.

I think I've probably just about used my time, exceeded my time. I'm not sure. So I'll now turn it over to Ms. Vázquez.

YOLANDA VAZQUEZ: Just out of curiosity, how many are students in the room? All right. And how many are in the criminal defense attorneys, either defense or prosecutors? Okay. Great. I actually am going to do my talk more on where sort of I think the future of *Padilla*'s holding has led us and is leading us. One of the issues that hasn't truly been discussed is the holding that *Padilla* had was a split baby. And because of it, I think that it has caused a lot of confusion, both with the courts, with defense attorneys, and with prosecutors. I also am going to discuss sort of the difference, and I know Mr. Long and Mr. Arnold brought it up, the difference between sort of the Fifth Amendment knowing and voluntary waiver of your rights during the plea colloquy by the court versus the Sixth

Amendment right to counsel and effective assistance of counsel under *Strickland.*

One of the things that I thought was interesting this morning was both Mr. Long and Mr. Arnold sort of downplayed their role in *Padilla.* But I think as line attorneys they — and appellate courts attorneys — that they are probably really the front line of this issue. The Supreme Court only handles about a hundred cases a year. The fact that *Padilla* made it up to the Supreme Court was a fluke, a miracle, whatever it was, but it's not the norm. The norm is whether or not the line attorneys are there to be able to represent their client in a way that gets them what their goal is. Their duty is to provide assistance, that is the goal for the client because these millions of cases aren't going to go before the Supreme Court. And as Mr. Long said or Mr. Arnold said, that Sixth Amendment cases were rarely going up before the Supreme Court. This year marks the fiftieth anniversary of *Gideon*, so there's been a lot of symposium on whether or not *Gideon* is effective. Once we had *Gideon*, it was decided there was a right to counsel. One of the biggest complaints about *Gideon* was that it didn't establish what that right meant. Was a warm body good enough? We have Sixth Amendment case law where you can be drunk, you can be on drugs. The attorney doesn't even have to be there, he can go plug his meter while the trial is going, and it's found to be perfectly okay. So again, I would hope that, especially as students, that when you enter the world of defense, as a defense attorney, that you aren't asleep, you aren't on drugs, and you aren't clogged by alcohol while you're representing your client because, while you may be able to effectively represent your client under the Sixth Amendment, that's not really what the goal is, I don't think, of *Gideon.*

Again, *Strickland* created this two-pronged test, but *Strickland* didn't occur until '84. So next year will be, what, the thirtieth anniversary of *Strickland*, so we can decide

whether or not that was a good decision or not. And then we really didn't hear from the Supreme Court again until about 2000. As you know, *Strickland* had established a two-pronged test; the first was, Was the attorney's performance deficient? And even if it was deficient, the client has to decide whether or not he was prejudiced by that. *Lockhart* established that, in the plea negotiation, it had to be determined that, but for the ineffectiveness of counsel, they would not have pled but would have insisted on going to trial. Professional norms were used, but they only said it was one, it was a guide. But it wasn't truly what the ultimate or only goal was under *Strickland.* And so we saw it wasn't until 2000 when the Supreme Court again stated that professional norms were actually much more important than the courts were giving credence to. These were death penalty cases where the attorney failed to investigate or mitigate for sentencing purposes, and so they said there was a duty to investigate based on professional norms. And again, when we see *Padilla* in 2010, they really stressed professional norms. But hopefully, we're dealing with — hopefully again — Jennifer talked about earlier, maybe in the next twenty years, where we're going to go. But hopefully, before the Supreme Court gets there, at least the line attorneys and everyone else that really is doing this groundbreaking work is already doing it.

One of the things with *Gideon* was they were saying thirty-five states had already created a right to counsel, even though the court hadn't gotten that far yet. So they were just going ahead with what the states were already doing.

So anyway, and the other thing that they downplayed is their sort of getting there by accident. I think, for many of us, we get there by accident, so we should always be prepared. My role in *Padilla* was with — Stephanos Bibas was one of my colleagues. He was actually called by Stephen Kinnaird. They had both gone to Yale together, and they had clerked for Justice Kennedy. When Stephen got

the case, he called up Stephanos and asked if he could do an amicus. Because they believed that amicus briefs help the Court decide whether or not to grant cert. And Stephanos called me up because he knew my scholarship was in this area. I was a public defender in Chicago in 1996. I was assigned to a domestic violence courtroom. As Jennifer said, in 1996 two of the harshest immigration bills — which affected immigration — were created at that point. One of the ramifications of those 1996 bills was deportation then became possible for those convicted of domestic violence offenses. And since I was one of the few Spanish-speaking attorneys in Chicago, I was assigned to a primarily non-English speaking courtroom where many of my clients were non-citizens.

So again, I became an attorney in D.C. I just fell into this, and I got the call from Stephanos as to whether or not we were going to be able to go on to the amicus. We were originally supposed to write this amicus for two of the largest criminal defense organizations in the country. I probably shouldn't be saying it while I'm being transcribed. They actually said no. They said that they didn't want to sign on to the amicus because there was no place in the criminal justice system for immigration, and that, of course, annoyed me to no end because as Jennifer said, since 1917 immigration has been into the criminal justice world. So again, as you can see, in 2012, two hundred and twenty-five thousand people were deported based on criminal convictions. I unfortunately do believe that *Padilla* will probably not decrease it, but it will actually help, I guess, some individuals. But the three largest percentages of people who are deported for crimes — based on drugs, based on immigration violations, and based on traffic offenses, whatever that definition is. That has to do with the increased enforcement and drug crimes. As Jennifer said, the war on drugs has been instrumental in sort of this immigration-crimmigration connection.

So all this was happening in the last thirty years. You could tell in the Supreme Court cases they started to take more of these immigration-crimmigration cases to be able to distinguish whether or not some individuals would be deported based on their crimes, especially in the terms of aggravated felonies, which as you heard, either had to be aggravated or felonies, especially with drug crimes. And then because of this 1996 — 1996 also made this increase in the amount of crimes that became deportable offenses, it also made it retroactive. So for those individuals who had pled guilty, for instance, in 1970 to something that was not deportable at the time, the 1996 laws went back, so now, actually, even though they pled guilty in 1970, they now became eligible for deportation based on the change in laws. So things started really running amuck, and the Supreme Court started taking notice of this. And you could tell in one of their cases, *I.N.S. v. St. Cyr*, that they were not exactly happy about it.

So when they took *Padilla*, we decided to write the amicus anyway. We were able to write it by — it was supported by immigration professors, criminal law professors, and two or three immigration organizations. And then cert was granted, and that got the ball rolling. And I must admit that, it is true, I got phone calls saying that that was not a good idea, we shouldn't do it. I was really happy that it came out sort of good because, if not, I probably wouldn't have a career right now. But anyway, so the hearing was in October of 2009, the decision was in March of 2010. And Justice Stevens wrote the majority opinion, and he sort of split the baby. While they said that there was a duty to advise as to the immigration consequences of a criminal conviction, what he actually said or the Court said was, if it was clear the immigration consequences were clear, succinct, or explicit, that defense attorney had to give specific advice as to what those consequences would be. However, if it was not succinct and straightforward, defense

counsel only needed to advise that this could have immigration consequences if they pled guilty. But anything more than that, you would have to go to an immigration attorney and find out.

One of the biggest things during oral argument in front of the Supreme Court was an interesting — as Mr. Long said, Dreeben, who was the solicitor general under Kagan at the time, actually had a question by Justice Alito, and he said, "So in a hypothetical, if I am a defendant, and I ask you as counsel, 'What are the immigration consequences if I plead guilty?'" And he said, "Well, I don't really know, you'll have to go get an immigration attorney for that." But I say, well, I was appointed to you. I don't have money to go get an immigration attorney. And counsel will then just say, well, that's just too bad. Is that how you want our system to be? And it was interesting because, after I left oral arguments, I really thought that Justice Alito was going to go with the fact that there was just an automatic right to be able to receive specific advice. He and Justice Chief Roberts actually decided that that was enough advice, just to say there may be immigration consequences, but if you want anything more than that, you need to go get an immigration attorney, which again, you have to pay for. And since the majority of people that are in the criminal justice system are poor and too poor to afford a criminal attorney, let alone an immigration attorney, it really causes problems.

But anyway. So we have this splitting sort of the baby. How can you determine whether immigration is so complex that all I need to, as the defense counsel, is to advise as to it may have immigration consequences, or I have to give specific advice? Now, in the majority opinion, Justice Stevens states, well, in the case of Mr. Padilla's case, all they had to do was open up the immigration book, the I.N.A., and see that drug crimes is a deportable offense. What he didn't talk about specifically was that actually Mr. Padilla's conviction as an aggravated felony was his kiss of

death. Lawful permanent residents who are convicted of aggravated felonies are denied the right for cancellation of removal, which is the discretion to be able to say, "Look, judge, I've been here so long," "I have family," "Please tell me I don't have to leave." They can't do that. So aggravated felony for the drug trafficking is a little more complex, although if you look at the federal guidelines or you look at the federal definition, it became a little bit clearer, and after the Supreme Court decided a couple of drug cases on that, it became even clearer than that. But how far do you have to go? Do I have to go look at a practice manual? And the Court says that, or at least Justice Stevens implied, yes, you do. But do I have to do anything more than that?

In the immigration book, it says "a crime of moral turpitude." Congress has never defined what a crime of moral turpitude is. So is that enough? Since I really don't know, I can just tell my client? Well, I actually think that one thing that *Padilla* did that was beneficial was that they talked about plea negotiations. That plea negotiations is actually a critical stage of representation and, therefore, protected under the Sixth Amendment. *Padilla* in that respect has been expanded. Last year, in 2012, two plea negotiation cases came down, *Lafler v. Cooper*, *Missouri v. Frye*, both on the same day, which that supported the issue that, under the Sixth Amendment, you have to be able to negotiate, and that is part of your Sixth Amendment duty. So I do think that, although *Padilla* sort of splits the baby in terms of how much I have to counsel as defense, I do think that *Lafler* and *Missouri v. Frye* actually answered that question as to you need to figure it out. As a defense attorney, you need to figure it out because you cannot negotiate with the prosecutor if you don't know what the heck you're negotiating for.

Missouri v. Frye was one where they didn't convey the offer, and so that was a little bit easier because you can argue, "Well, I can convey the offer to my client, but I don't

necessarily have to know what that offer is." But *Lafler v. Cooper* was where there was a plea offer, the defendant wanted to take it. His counsel actually talked him out of it, which was really a wrong decision, and at the plea it was fifty-one to eighty-five months. He ended up rejecting the plea, went to trial, lost, and was sentenced to a hundred and eighty-five to three hundred and sixty months. And so what the court said was that plea negotiations again is a critical stage, that you have a duty — and mis-advice is ineffective assistance of counsel. It goes back to *Padilla*. *Padilla* did not — they decided that mis-advice versus non-advice is not the issue because what happens if they were to split it. First, it would create silence within defense counsel because they wouldn't say anything because I would know, well, if I don't say anything, I'm not ineffective. But if I try and I misadvise, I am. And second, it would create defendants who have the least ability to be able to represent themselves, and that's what counsel is there for. So my argument, especially after *Lafler v. Cooper*, is that you need to figure it out. I do think there are ways. ABA has developed a three-million-dollar project, which they're trying to get collateral consequences across the country on one database. As you heard, Mr. Arnold has already set up a chart. There's charts across the country in each state that are developing. Sometimes law school clinics are helping with that. It is happening. The Bronx Defenders Association actually has a collateral consequence unit. The I.L.R.C., which is out of California, actually contracts with attorneys to be able to give immigration advice. Private law firms and solo practitioners are also contracting with public defender organizations and solo practitioners, so it is something that is here to stay. And as Mr. Arnold has said, it is our duty as a criminal defense attorney to be able to help our clients with their goals, and sometimes staying here is more important than the criminal conviction itself.

One of the issues that Mr. Long did discuss was this increase. As we know, *Padilla* tried to keep it to immigration, and they said that they would not address the collateral versus direct consequences; however, across the country you are seeing it. Sorry, Mr. Long. So it is happening. Pension lost in Pennsylvania now has to be advised to parole eligibility in Missouri and probably several other states. Sexual offender registration in Michigan in Eleventh Circuit and civil proceedings in Alaska are just a couple of those that are expanding. Again, collateral consequences are — there are many of them. But they prevent our clients from being able to not only vote, to have housing, to get themselves an education because they can't get federal funding for it. It is very, very important to our clients, and I don't think we can sort of play the victim and just say, it's too complicated, because, if it's complicated for us as attorneys, just imagine what it is like for our client.

Now, this Fifth Amendment versus Sixth Amendment, the Fifth Amendment is the admonishment by the court. Sixth Amendment is the right to counsel. Justice Kennedy during oral arguments was really onto this. At the point of *Padilla*, there were, I think, twenty-three states which had plea admonishments done by the court. However, there is a difference between a Sixth Amendment right to counsel and a Fifth Amendment duty of the court. Florida has litigated it. They first said that, yes, admonishment by the court cured any defect by the attorney. It was later overruled. I do believe that across the country, again, when the court and prosecutors worry about finality of the plea, that's the tension that we see. We see in, I think it's Arizona, that the prosecutors are demanding that any potential future *Padilla* is waived. So even if you don't know you have a future *Padilla* claim, you've waived it. So it's interesting. We'll see how far that goes, if it ends up going up to the Supreme Court. But again, our duty as defense counsel is very different than the duty of the court.

And as we know, our clients usually don't say much once they're in that plea colloquy, even if what they're hearing is different or what they're hearing is something for the first time.

So these are some of the things that I think are coming as a result of *Padilla*. Again, I think in the lower courts, it is a hit or miss, but I think still our duty as defense counsel is to try to help to figure it out so that we don't have to worry. It's a lot cheaper if our clients don't have to appeal. It's a lot cheaper if our clients are deported. As you heard Jennifer state, it's costing billions of dollars for detention on — and deportation. And if we can just redirect those funds and to increase spending in the crippled defense world, it would be a wonderful thing, even though maybe not a popular thing.

But I think I'll close my remarks right now, and I look forward to discussing this further with you.

CHRISTOPHER LASCH: I also want to say thanks to the *Journal of Law and Policy* and also to the *Journal of Race, Gender, and Social Justice* for supporting today's symposium. When I was invited to speak on this important case, of course, I jumped at the chance. And to do so on a panel with Yolanda and Jennifer is a real treat. Thank you.

I would like to talk about and offer some encouragement for pushing beyond *Padilla*. *Padilla* certainly is a step forward in some ways. The recognition that the consequence of deportation cannot be described as collateral in the experience of the person facing it is a significant recognition. And I also would like to share Jennifer's optimism that this reflects a little bit of realism on the Court's behalf about what the world actually looks like in terms of the connection between criminal proceedings and immigration proceedings. So I think that *Padilla* is certainly a step forward and a cause for some celebration. But I also think that it has its shortcomings and that we need

to be thinking about how to go further in some different directions.

I will proceed in three parts. First, I will discuss briefly what I mean when I talk about *Padilla* — what it is I am claiming we need to go beyond. What are the substantive and procedural shortcomings with *Padilla* that I am talking about? Second, I will talk about, specifically with reference to substantive shortcomings, how we can push beyond the limited right that the *Padilla* decision recognizes — how we can pursue the logic of *Padilla* to further reasonable conclusions appropriate to the crimmigration world that we live in and that Jennifer Chacón described. And then third, I will spend a very short amount of time on *Padilla*'s procedural shortcomings and what we might do to overcome those and turn *Padilla* into some truly enforceable constitutional norms.

So what is *Padilla*, and what are the substantive and procedural limitations that I am claiming exist? What is it that I'm saying that we need to move beyond? Substantively, although a step forward, I think that *Padilla* represents a limited articulation of a constitutional right. I think that what the Court is saying the Constitution guarantees here is, in fact, somewhat an impoverished view of what the Constitution can provide. I say that because *Padilla* focuses solely on the ultimate consequence, on the end game of immigration proceedings, on what the Court refers to as deportation consequences. And I say what the Court refers to because the fact that such proceedings are no longer called deportation proceedings is a point worth noting. They are called "removal" proceedings, which is significant in thinking about the world we live in because for me, at least, "deport" is a verb that clearly applies to a person, whereas "remove" might be something that you do with any sort of *thing* that you don't want in its current place. I think the language of our current immigration system says a lot about where we are with respect to

immigration. I think it is significant that the *Padilla* court references it as "deportation consequences." We see a little more humane terminology in *Padilla*.

The Court discusses the severity of deportation as a consequence and the automatic connection between some criminal convictions and these severe deportation consequences. These factors, the Court finds, make it very difficult to cabin off deportation as a so-called collateral consequence. So I think the constitutional right recognized in *Padilla* is expressed very narrowly in terms of a deportation consequence that is thought to be extremely severe.

I also think that *Padilla* is not just substantively limited in its vision but is also procedurally limited. A lot of this is because of the posture that the case came to the Court in and the precise question that the Court was called on to decide. But the rule of decision that we are talking about in *Padilla* is the *Strickland* rule. Tim Arnold earlier lamented the deficiencies of *Strickland*, and he is certainly not alone. Scholars have raked the *Strickland* text over the coals for its inability to make good on *Gideon*'s promise of a lawyer, an effective lawyer for indigent defendants.

The *Strickland* test has two prongs. People this morning have discussed this a little bit. The first prong is the deficient performance prong. You have to prove that your lawyer operated outside a wide range of what competent counsel might provide. Stephen Bright referred to this as the mirror test. If you can hold a mirror up in front of counsel and it fogs up a little bit, we might have satisfactory, constitutionally sufficient performance.

The second prong is the prejudice prong. You have to prove that things might have been different but for your counsel's deficiencies. And then the cases that *Padilla* is mostly talking about are guilty plea cases. We are talking about a situation where somebody comes before the court and says, "Yes, I know I stood up and said that I did all

these things, but actually, I would like to take that back and go to trial. And I would like to get a jury in here, and I would like to have several days for a trial." You can imagine that courts might be somewhat loathe to let people pass this second prong of the *Strickland* test. Those are the two limitations that I see with *Padilla.* A substantive limitation in terms of what the right articulated is and a procedural limitation in terms of how you vindicate that right.

So, how do we go beyond the limited substantive right? How do we get beyond just the idea of the deportation consequences? Jennifer Chacón talked a little bit about the crimmigration world, and one way of thinking about that is that there are all sorts of crimes which carry over consequences into the immigration world. But there is another way in which crimmigration has occurred over the last twenty years. It is not just that the immigration world bleeds over into criminal proceedings in important ways that *Padilla* says we have to be aware of, but it is also that the immigration proceedings themselves have become criminalized. As a clinical fellow at Yale, I walked into immigration court for the first time to figure out how I was going to teach students how to practice in the immigration courts. And I had been a criminal defense attorney up to that point, and I was a little nervous about going to immigration court for the first time. But when I got there, I was completely put at ease by the familiarity of what I found. There were people in jumpsuits in detention that looked a lot like the criminal courts that I was used to. There were people appearing via closed circuit television. There were people without counsel. I was not prepared for the absolute lack of procedural protections that people in immigration proceedings were accustomed to. Since I was used to practicing in the criminal world, I was used to the idea of a constitutional right to counsel and other forms of due process. As my colleague at the time, Michael Wishnie,

told me, "We have not had the due process revolution in immigration court yet." So, immigration court does not look that different from criminal court, and it shares, in fact, one of the hallmark features of the criminal justice system, particularly since 1996, which is pre-adjudication detention. I would call it pretrial detention, except that you do not get a trial in immigration court. You just get a hearing.

Because immigration proceedings appear so criminalized, many scholars have called for the importation of criminal due process protections in immigration proceedings. Once you start to realize how criminalized the immigration proceedings look, it becomes easier to think about the role of criminal defense counsel on the front end of this. Think about two sets of proceedings: first, the criminal proceeding in which a crime is charged and then, a second proceeding, which is the immigration proceeding. Although the Supreme Court tells us that the immigration proceeding is civil, understanding it as highly criminalized may help understand what the role of the criminal defense lawyer on the front end might be. It seems quite logical that a criminal defense lawyer representing somebody who might be subject to a second *criminal* proceeding would take steps, such as: (1) trying to avoid those additional charges being placed at all, (2) improving the client's position with respect to whether the client will be held in detention during that second set of proceedings, and (3) improving the client's position with respect to the ultimate outcome of those proceedings. Once you realize that, you might say this carries over pretty easily into the immigration world, and the idea of what a criminal defense lawyer ought to be doing on the front end goes beyond just the criminal issues.

Padilla, of course, recognizes only the third of those: improving the client's position with respect to the ultimate outcome. But I think that we ought to recognize all three, and so here are some ways in which I think that we can push

beyond *Padilla* to think about how the world ought to be, and what the Constitution should guarantee, given the realities that I have discussed.

First, we can expand the types of cases in which criminal counsel actually must be appointed. For example, misdemeanors that do not carry jail time, for which you ordinarily would not get a lawyer under the Sixth Amendment, can have immigration consequences. And a lot of minor misdemeanor convictions result in people being shuttled over to the immigration system to endure the consequences of those convictions. There are a lot of cases where there is no lawyer in criminal court followed by serious consequences in immigration court. There are also many misdemeanor prosecutions in criminal court where you might not be afforded counsel because the prosecution has indicated it will not seek jail time. For example, there are many jurisdictions, such as Massachusetts, where the prosecution can waive jail time, and therefore the court does not need to appoint criminal counsel in those cases. But lots of those cases can have immigration consequences other than deportation. Specifically, one that is quite serious is mandatory immigration detention. Again, as a criminal defense person walking into immigration court, this struck me as something new. I am used to going into court and having my clients always have a chance for some sort of bail to be set. In immigration proceedings, if you have been convicted of certain offenses, there is mandatory no-bond detention, which means you will be in jail throughout the pendency of the immigration proceedings. Since the Sixth Amendment right to counsel in criminal cases is ordinarily guaranteed for those facing jail time, it seems like a logical extension, particularly after *Padilla*, to apply the Sixth Amendment right to misdemeanors that might not carry jail time in the criminal case but do qualify for mandatory no-bond detention in immigration proceedings. I think there are other instances where we could think about expanding the

Sixth Amendment right to criminal counsel — any case in which an immigration detainer is filed, for example. Alternatively, perhaps the appointment of counsel should persist through the handling of issues related to an immigration detainer.

So in addition to expanding the types of cases in which criminal counsel must be appointed, *Padilla* also suggests that we re-visit the idea of the types of services that criminal counsel must provide with respect to immigration consequences. And again, I am talking about a more expansive view of immigration consequences, not just the ultimate *deportation* consequences.

Those expanded services should include counseling. The client may need advice concerning not just deportation consequences but also about immigration detention issues. Is the client going to be subjected to mandatory no-bond detention? Is the client going to be subjected to a detainer? In appropriate cases, the client probably needs some advice from counsel about whether to discuss his or her place of birth or his or her citizenship status with any other persons other than counsel, like law enforcement or immigration officials who are visiting in the jail. In appropriate cases, the lawyer should avoid making any on-the-record references to immigration status. Courts often sort of seek this information out during a plea colloquy by asking, "Counsel, do I need to give a *Padilla* advisement?" That might not be a question you want to answer if your client is, in fact, going to be defending immigration proceedings in the future. Here again, my focus would be on improving outcomes for the criminal client in this second set of proceedings, i.e. immigration proceedings, not just with respect to the ultimate consequence but with respect to every step along the way.

Additionally, in addition to counseling issues, we could add some litigation to the criminal defense lawyer's responsibilities, especially in regards to immigration

detainers, which are incredibly important. An immigration detainer is a piece of paper that federal immigration authorities fax to a state jail or prison or a local jail saying that they want the prisoner currently in criminal proceedings for immigration proceedings. It tells the state or local authorities that, when they are done with the current criminal proceedings, they are to hold that person for a period of forty-eight hours, not including weekends or holidays, and then the federal authorities will come and get the prisoner. In 2009, around 10,000 to 15,000 immigration detainers were issued. Now it is a quarter of a million every year. Immigration detainers are the way that the pipeline has been set up to channel people from state and local criminal proceedings directly into immigration proceedings. And it happens that there are numerous legal issues surrounding immigration detainers. Can your local officials be obligated to hold someone pursuant to one of these detainers? And if they cannot be required to hold somebody, are they authorized to hold them? Does the Fourth Amendment have to be satisfied? After *Arizona v. United States*, we are told that state and local officials do not have unlimited power to arrest people for suspected immigration violations, but that is exactly what an immigration detainer amounts to. It is a warrantless arrest based on an alleged civil immigration violation. So there are lots of legal questions surrounding detainers. The criminal defense lawyer is authorized, and the Sixth Amendment makes sure that this happens, to fight tooth and nail to make sure that the client in a criminal case does not get a two-day jail sentence at the end of the case. So why would it be that a criminal defense lawyer would not be similarly authorized to fight an immigration detainer? Or why would the Constitution not *require* a criminal defense lawyer to fight a two-day detention waiting at the end of the criminal case just because it is pursuant to an immigration detainer? So I think that there are questions about

expanding the scope of defense counsel's obligation and representation in those ways.

In regards to the procedural narrowness of *Padilla*, of course we can continue to litigate these types of claims the way *Padilla* did. We can bring a post hoc, post-conviction petition and allege that counsel was ineffective and that the ineffectiveness caused prejudice to the client. But *Strickland* is a very hard test to meet. In fact, it is probably the worst test that could have been put in place to implement the rights that we are talking about. It really has no relationship to *Gideon*'s promise of having an effective lawyer. So I would suggest that we need to think about litigating *Padilla* on the front end as much as possible, instead of coming to these issues from a post hoc position where the courts are going to give strong consideration to the finality that the court wants the pleas to have. We need to litigate these issues up front. If public defenders are overburdened by case load, they probably do not have the time needed to meet the *Padilla* obligation. Overburdened public defenders are not being given the resources or the time to meet with their clients. For example, in New Orleans in 2009, the statistics indicated that the public defenders spent about nine minutes with their clients per misdemeanor case. If that is the situation, *Padilla* is probably best litigated on the front end by motions to the court, which can in many cases be made ex parte and under seal. Defense counsel should ask for funding to consult with an immigration attorney or to have an immigration attorney be appointed to this case or for more time to consult with their clients because this is an issue that they ordinarily do not have time for. So, my emphasis on the procedural side is we need to shift the litigation emphasis from the back end to the front end.

Thank you.

PAULA SCHAEFER: I want to thank all of you for being here. It's been a great panel so far, and I think it might be nice to start with asking you if anyone wants to follow up on a comment that one of the co-panelists made. Was there anything that someone else on the panel said that you want to respond to? No? I'm going to ask one question then, and then I'll open it to the audience and walk around with the mic and ask some questions.

Obviously, *Padilla* is about effective assistance of counsel. It's not about competence or best practices. I would be interested in all of your thoughts about what training law students and criminal defense lawyers should be seeking if they want to achieve competence in this area.

JENNIFER CHACÓN: I guess I would start for the law professors and for the law students who are kind of starting their law career, if you are interested in criminal work, be that prosecution or defense, take an immigration course. You should have some fundamental awareness of the basic collateral consequences that attach to criminal convictions. And it's a pretty complicated, thorny area, and it's worth having that overview.

I also would say — and I'll turn it over to you guys to kind of offer more details. When I was preparing for this panel and thinking about what I could talk about, I actually had a research assistant go out, I said, give me a binder full of kind of what the best practices are, what people are doing to implement *Padilla*, what are the requirements but also kind of how are people dealing with the requirements, how are they setting up their own practices. And my research assistant has done that. So I think, if it's possible, probably through the conference organizers, I'm happy to provide sort of my bibliography list of what these kind of resources are so that, if you haven't accessed them or would like to access them, you can find them. I found them — I could actually kind of limit the list now, but I've read through most of them

and identified the best practices based on what I've read. And I'm happy to provide a list of those things. But that might be some useful reading for people who are looking for something that's concise and clear about what the obligations are.

YOLANDA VÁZQUEZ: I think one of the things that's been great is when I went to UC — I actually teach crimmigration. So I teach a seminar on the intersection between immigration and criminal law, and those classes are popping up across the country, which I think is great because I think, for many students who want to be either criminal or defense attorneys or prosecutors, that's definitely a class that they should take, especially if there's — part of it is just practice, what's an aggravated felony, what's a crime of moral turpitude. I think there's places across the country that students — AILA, I think it's free for students, which is American Immigration Lawyers Association — becoming involved in that. I think setting up your own groups — There are resources, Norton Tooby has great practice guides that are really helpful. I think finding a public defender organization or prosecutor's office that deals with this issue and being able to intern, even working with an immigration attorney during school or in the summer, I think is probably really good. I do think it's something that, as Jennifer said, all people who want to go into criminal law should be a part of at this point. It is not going away.

CHRISTOPHER LASCH: And on top of that, I would suggest going to immigration court and observing proceedings for a lot of different reasons. The world that you learn about in law school is very different from the world that exists out there. And I think that is true across the board no matter what substantive area of law we are talking about. But as a criminal defense person, the practice in the courts does not match up to what you would expect it

will be after reading about it. And the same is true for immigration court but ten-fold. I think that you can also realize the impact that detention has on immigration proceedings by going and watching immigration proceedings. It is just like the criminal world, where pretrial detention is used as a mechanism to coerce "consented-to" outcomes. That is true in the immigration law as well. Going to court makes you appreciate the actual consequences that are at stake.

It is very easy for criminal defense attorneys to think in an abstract way that their job is to bring the criminal case to a successful conclusion and whatever happens in the immigration court happens in the immigration court. But going and seeing what actually happens there helps you to understand that things are not going to get better over in immigration court if you do not do your job on the front end.

YOLANDA VÁZQUEZ: As Jennifer said, and today others have said, if you get a conviction in criminal court, once you get transferred to immigration court, most of the time there's no relief. It's that criminal conviction that really boxes a client in, and so the only way you're going to save a client is to make sure that he pleads to something that doesn't make him deportable or at least you have some sort of relief. And again, in immigration courts, since it's a civil proceeding, you have a right to counsel but not at the government's expense. And since the majority of the people in immigration court are poor, just like in the criminal justice system, their not going pro se in immigration court against the government is pretty near impossible. And so we have to also think of that as criminal defense attorneys. And Chris talked about detention. Immigration detention overshadows the Federal Bureau of Prisons. The Federal Bureau of Prisons holds approximately 200,000 detainees. Immigration is approximately 400,000, twice as many. So again, this is something that's really, really important when

we're talking about a conviction and whether then your client is subject to mandatory detention. And again, as Chris said, if they're mandatorily detained, they just want to get out, regardless of whether they have relief or not.

JENNIFER CHACÓN: And the other thing I'll say is we have been pretty focused on, as *Padilla* is very focused on, the obligations of the criminal defense attorney in this context, but I think, obviously, if prosecutors are concerned about the finality of a plea, then they too need to be sort of aware that these discussions need to be happening. And they can be sensitive to whether they're happening and to the extent that there are genuine justice concerns about — often the prosecutor enters into negotiation and thinks that they are actually helping somebody who seems relatively sympathetic to getting a good deal. And it is not a good deal, and I think that's the kind of — it's not a good deal if it winds up in life-long banishment for somebody — the seriousness of standard applies here. So I think although this kind of — *Padilla* definitely frames the obligation in that way, and although much of our discussions really focused on that obligation, there is kind of a broader obligation that runs to judge and prosecutor as well, just in the terms of the administration of justice.

YOLANDA VÁZQUEZ: And one thing, I guess I want to add because I forgot, citizenship. As Jennifer said, citizenship is much more complicated than we think. But if you can prove your client is a U.S. citizen, they're not supposed to get deported. They have been deported, but that's what's not supposed to happen. And so again, citizenship isn't just where you were born, it's what status your parents have and where your parents were born. I think that one of the biggest things that I saw when I used to do outreach was that there was a new law that said, if your parent naturalized before you turned eighteen and you were

a lawful permanent resident, you were in the legal custody of the parent that naturalized, that you automatically became a U.S. citizen. And most people do not know that. We always found at least one or two children who were U.S. citizens and did not know it. And there's a case, *Juan Estatz*, out of New York. He was deported on an aggravated felony, he was then found again, people like to return. In New York City, he was sentenced to five years in jail. His deportation was supposed to come. Immigration came and said, "We were actually going to deport you, but we realized that you were a U.S. citizen and you were actually a U.S. citizen before we deported you the first time." And so then he had to litigate because he was subject to parole, and they wanted to keep him on parole. But the judge was like, "He's a U.S. citizen," "You got it wrong the first time," "You can't keep him on supervised parole." But again, it happens, so not only where he was born, what the status of his parents were and sometimes even his grandparents.

JENNIFER CHACÓN: The other thing I would add just in terms of kind of things that are important but may not superficially seem important, the criminal record generally. It's not just this crime and what are the consequences of this crime, but are there other crimes in the past that are going to give specific consequences to this crime, particularly if they were crimes involving moral turpitudes or multiple crimes, multiple criminal sentences, which takes something into the realm of a particularly serious crime. Those kinds of questions I think become important. To the extent possible, knowing the full criminal record, knowing the full immigration history, and then knowing any possible facts that pertain to citizenship.

PAULA SCHAEFER: I want to open it to the audience. I have a microphone that will help them pick it up on the recording.

UNIDENTIFIED SPEAKER: I wanted to ask a question to Chris, but anybody can answer it. What as a public defender practicing in state court do I do to fight tooth and nail to get rid of that detainer? Do I file a motion in state court, do I call the federal public defender's office and ask them to file my motion in federal court, as even a motion? And do you have one that I could have?

CHRISTOPHER LASCH: Sadly, I do not have a motion because that would be such a nice answer. But I am happy to talk with you at great length about fighting detainers tooth and nail. There have been three class action lawsuits brought that I know of that litigated detainers. One in Connecticut was settled pretty favorably with the Connecticut Department of Corrections changing its entire policy about what detainers it was going to honor. I think that that lawsuit really shook the Connecticut officials. The idea that they were legally allowed to hold people pursuant to detainers in all circumstances has sort of been the routine part of criminal law enforcement. Detainers are not a new thing for jails and prisons. So, when jails and prisons receive immigration detainers, their first response is that they should just handle this like a criminal detainer, which is all pretty routinized and straightforward. But there are real questions about immigration detainers and the legality of it. I can point you to some resources that will help identify the legal arguments that can be made and to some of those class action habeas petitions that have set forth the different grounds for relief.

PAULA SCHAEFER: I think we have one in the middle.

UNIDENTIFIED SPEAKER: Yes. Two things, first, Professor Chacón, you said something about providing a reference to somewhere where we could go to get forms or

what have you. I get my responsibilities as a lawyer, but in terms of the nuts and bolts —

JENNIFER CHACÓN: Yes.

UNIDENTIFIED SPEAKER: Anything you could provide, a list of questions, what do you ask somebody who you suspect might not be a U.S. citizen in order to fulfill these obligations. If you could provide that, that would be great. My second question is: If you are someone who practices doing appointed criminal defense work, either on the state or federal level, have you all had experience with problems getting compensated for immigration issues? Because, here in the Eastern District of Tennessee, on both the state and the federal level, we lawyers are hearing a lot about we're spending too much money for CJA lawyers and things like that and are looking at ways to cut back. If we are billing — and this is sort of a practical matter — if we're billing for things relating to, say, immigration issues, something that is not strictly or necessarily related to the criminal case that we're appointed on, do you have any thoughts about that, or have you seen problems in getting those things sort of kicked back at lawyers?

YOLANDA VÁZQUEZ: I was always the public defender, so I didn't have to worry — I was salaried. But I do know that there are people across the country that have been able to get money arguing the fact that if they don't, under *Padilla* — and now I think you probably could even under *Lafler* — if you don't, you're basically ineffective, and therefore, an appeal is going to come up, which is going to cost more money. And then judges have actually started to give money realizing that they can't — they want the finality of the plea. So if you can articulate an argument that "I can make this final, you just have to pay me up front, judges," at

least some judges have been saying, okay, this is what you're going to get.

UNIDENTIFIED SPEAKER: But it's like *Padilla* in your request for, you know —

YOLANDA VÁZQUEZ: Definitely. Right. And I probably would even start to push the envelope with *Lafler* with the plea negotiations as well, yes.

CHRISTOPHER LASCH: I certainly appreciate the bind that you could find yourself in if you are worried about getting denied on the back end of a case and you do not submit your billing usually until the case is concluded. So, one alternative approach would be to seek funding for an immigration attorney under the CJA.

UNIDENTIFIED SPEAKER: Is that available under the CJA?

CHRISTOPHER LASCH: Well, I have definitely seen that argument made that funding for an immigration attorney should be within the set of services that an attorney can seek funding for.

UNIDENTIFIED SPEAKER: That would be helpful. Thank you.

PAULA SCHAEFER: I've got a question here, and then we'll go over here.

UNIDENTIFIED SPEAKER: We maintain a website with another organization called DefendingImmigrants.org, and we have all the nuts and bolts materials that the previous questioner asked about in terms of what your obligations are

in the scope of *Padilla*. So I would strongly suggest that people go to DefendingImmigrants.org.

Another thing I was going to ask was a question — I heard a couple of people sort of talk about this second prong of the standard for ineffective assistance in a plea case as "I would have gone to trial." I understood that there would be a probability of a different outcome, which could include — a different plea would have been negotiated, which in the *Padilla* post-conviction world, sometimes can just mean instead of getting a theft conviction for 365 days, I would have gotten that conviction for 364 days. And given the probable willingness of most judges to have sentenced the person to 364, especially if it was suspended, that might be and I think some people have found that that kind of outcome is more easy to secure on post-conviction rulings. I'm pretty sure that that characterization is more accurate, especially in light of *Lafler* and *Frye*, that there really is a duty to negotiate an effective plea bargain; is that right?

YOLANDA VÁZQUEZ: I would argue yes. And just so — Dan, saying the difference, 364 through 365, that's the difference between an aggravated felony and not an aggravated felony. So that one day makes all the difference in the world.

CHRISTOPHER LASCH: I would add to that that the second prong of *Strickland* speaks about a reasonable probability of a different outcome. People tend to sort of cut to the chase and talk about whether there would have been a different outcome. But technically that is not the standard you need to meet. Whether that gets you anywhere in your particular forum may vary.

JENNIFER CHACÓN: I think some of the articulation gets muddled because I think *St. Cyr* formulates it slightly differently. I think you could ignore that and argue the way

that you're arguing. I think that's how *Strickland* articulates the test.

YOLANDA VÁZQUEZ: Although, there are still some jurisdictions that say he would have gone to trial.

UNIDENTIFIED SPEAKER: I have a question about what you guys think in terms of the way that the criminal and immigration system is set up, as all of you have articulated it, with folks having access to a lawyer in the criminal system but then often not having access to an immigration lawyer once they're in removal proceedings, in terms of how that plays into the actual enforcement of *Padilla*. So folks who were misadvised or not advised in the criminal system, let's say that happens, which I anticipate will, unfortunately, continue to happen, it happens every day, all day long after *Padilla* was decided. But still, a lot of criminal defense lawyers don't know and aren't able to provide the kinds of immigration advisements that they should under *Padilla*. But folks are then pleading badly without being advised and then being shuttled to immigration court, they don't get a lawyer, they get removed. What are the chances that they're going to bring ineffective claims? That is a real concern for me in terms of the court saying in *Padilla*, "Look at this great system we're setting up, oh, we're supposed to do X, Y, and Z." And every one being like, yea, yea, yea, *Padilla*. But then realistically, our non-citizens who have already been removed who were advised badly because they pled badly in the criminal system, so they didn't get a *Padilla* effective lawyer, are they really going to be able to bring ineffective claims? What are your thoughts on that?

CHRISTOPHER LASCH: Yes, there are huge barriers to that. That is another reason why I think litigating everything on the front end has become so important because the back end is so ineffective to address this problem. But think

about a case where you do not get a lawyer in criminal court because you are charged with a misdemeanor that does not carry any jail time. Then you go to immigration court, also without a lawyer. I think we need to attack both of those pieces. I think *Turner v. Rogers* offers some hope for reinvigorating arguments about a right to counsel, at least in some cases in immigration court, and it is the idea that there are uncounseled criminal convictions that may be deficient. This leads to another argument about why you need counsel in immigration proceedings. You need counsel to raise that kind of issue for immigration judges to take into account.

YOLANDA VÁZQUEZ: And I completely agree. If you're not getting enough to finance the back end, really even worse. I do think, like Chris said, *Turner v. Rogers*, I think, is a great case for there to be some policy litigation that you do have a right to counsel in immigration because you're against the government and the possibility of deportation, the Supreme Court has already said, it is a harsh penalty. So I think there has to be some kind of litigation. I know under Obama's comprehensive or immigration reform, he talks about the discretion of the judge being able to appoint counsel for unaccompanied minors, the mentally ill, and some detainees. And so we'll see if that stays. So the administration recognizes this problem, and hopefully we'll be able to get in at that end as well.

JENNIFER CHACÓN: But I think you're right. The bottom line is, for significant numbers of people, there's the practical effect. They will receive bad advice or mis-advice on the criminal end, and they'll serve a sentence. They will be put in deportation proceedings. There will be no one to reexamine what's happened, and then they will be in Thailand or El Salvador or Britain or wherever it may be. And that's the end of the matter, which I think goes to kind of the earlier point about as much as can be done on the

front end should be done on the back end. Really, it's not a cure-all remedy that's going to get at every situation of bad advice or no advice.

UNIDENTIFIED SPEAKER: One of the panelists talked about how advice applied to different areas of law outside of immigration, as far as collateral effects — Do you think that trend is likely to continue, and is the legal community, the legal marketplace going to be able to fill that void cost effectively? And is it likely that it wouldn't?

YOLANDA VÁZQUEZ: I love the cost effectively. We spend billions of dollars on detention. If we could just re — the money is there, it's just spent differently. There are, I think, what the Professor said — there's, approximately, what, seventy thousand collateral consequences across the country changing daily. And so do I think it's a trend that's growing? Yes, I think it is something that is being litigated because, again, it's the goal of the client, and if the client needs to stay in his housing, if he wants financial aid for school, those are all — I think the right to vote — they are all very important things. I think, again, there has to be a policy about doing something by curtailing the collateral consequences that are attached versus sort of saying, well, we're just — it's going to tie up our hands because we shouldn't have to do this because it's too complicated and just too much. So I do think one of the things about *Padilla* is it reinvigorated, I think, defense counsel to be able to really think that they could start litigating these things, and it's starting to break through across the country. And I do think that people will continue to do that, which I think is good.

JENNIFER CHACÓN: I think what's tricky about it is it's so patchwork. Depending on the jurisdiction you're in,

which collateral consequences you're required to advise someone about is going to be different, and I think that is revealed by your list. And the collateral consequences are perpetually shifting or changing in every jurisdiction. So I think there is an effort on the part of — there's a working group in the ABA that I think that Jack Chin is spearheading that and trying to kind of get a handle on whether can we create a database of what the collateral consequences are. Can we make something accessible to attorneys that are going to be in the position of having to give this advice? So there is some work being done on that, but it's not done. And it's not easy.

I think that to me kind of what I take out of this is that perhaps one of the biggest favors that you can do any client is try to figure out what their priorities are, what are their priorities as a general sense, and to think about this. And you're not going to be able to do that with regard to all of the collateral consequences, given how many there are and how varied they are. But I do think that to the extent that you can at least very briefly get a sense of is the deportation consequence more important than the criminal conviction — Is the losing of the gun more important than the length of the thing? To the extent that knowing you have some general sense of what the client's priority is, that might help to navigate, but it's not the answer.

CHRISTOPHER LASCH: In a way I think your question highlights a real drawback of *Padilla*, which is its focus on the lawyer instead of on the client. A whole different way of looking at this is not whether are lawyers allowed to give bad advice, but what do we do when a person receives bad advice? So, instead of bringing up the question in terms of obligation of counsel, which makes courts very motivated to curtail that, maybe bring up some collateral consequences that lawyers would agree are so far outside the realm of criminal services. The most important thing to the client

might actually be that the client got bad information from a lawyer or some other source.

JENNIFER CHACÓN: And avoiding removal, deportation is not always the goal of the client either. So I think that may be an automatic assumption that people make, and it's not always the right assumption. And there may be some clients that are happy to be deported sooner to avoid a lengthy criminal sentence and/or lengthy immigration detention, and it's worth assessing that out too. But it's complicated.

PAULA SCHAEFER: There's a question in the back.

UNIDENTIFIED SPEAKER: I don't know which one of you did this, but you quoted or recited a case a second ago, *I.N.S. v. Saint* something, and then you explained it. It sounds like an interesting case. I didn't get the last part of —

YOLANDA VÁZQUEZ: Oh, *I.N.S. v. St. Cyr*?

UNIDENTIFIED SPEAKER: Yes.

YOLANDA VÁZQUEZ: S-t. C-y-r. And it was 2001, I think.

UNIDENTIFIED SPEAKER: Thank you.

PAULA SCHAEFER: We have a question over here.

UNIDENTIFIED SPEAKER: I would just like to follow up on the first question in the back, which was, if you are appointed to a client who does have an immigration hold, the answer was a class action lawsuit. I'm not a class action lawyer, I'm a criminal defense lawyer. Is there anything,

any motion that can be filed to try to get that hold removed? Just as an example, if someone has got a hold from another state, well, that would fall under the Informed Extradition Act, and in Tennessee there's actually a motion and a procedure, a law to cite, to get that individual a bond. But my judges say, "Well, that's a federal hold, I don't have jurisdiction, and I don't know of anything even to file." So if there were any ideas on that.

And the other is, recently ICE has been putting people on probation. Maybe that is something that always existed in the law, but it has only been utilized in my experience here recently, meaning if they made their bond in state court or if they were granted an OR bond after a period of time where they were in custody only on the immigration hold, they are being released on, for lack of a better phrase, ICE probation, to see the disposition of that case. Do you have any advice how to encourage ICE or to petition for ICE probation?

CHRISTOPHER LASCH: I did not mean to suggest that you need to file a class action lawsuit because I agree that that would be really unhelpful advice. My point is that there have been lawsuits filed, so you can get the pleadings in those cases and maybe use those arguments as a starting point for drafting up a motion or a pleading in a case that you have. Whether state court judges are going to be the best forum or not because of the problems you identified, like this is federal law, is a question that will be answered jurisdiction by jurisdiction. State courts have jurisdiction to entertain a habeas petition, for example. You argue that the criminal charges were dismissed, your client is being held pursuant to this detainer, and there are the legal infirmities with it so the client needs to be released. All state courts are familiar with that kind of a habeas petition, somebody who is being held unconstitutionally. Some criminal judges might entertain a motion with respect to a detainer during

the pendency of the criminal case. The criminal judge might take the position that he/she has jurisdiction over the case, and that includes telling the jail what to do with the detainer or not. So, there are motions that you can think about filing, whether they are going to be successful or not, of course, is going to depend on your judges and their receptiveness to the argument.

The other thing that people should be aware of is that, in December of 2012, ICE completely revised its detainer form and its detainer guidelines so that in theory they are meeting a set of criteria before they issue these detainers. A good starting point would be to get a hold of a physical copy of the detainer that your client is being held pursuant to, and check it to make sure what ICE says is true. For example, maybe your client does not have three prior misdemeanor convictions, which is what ICE is saying is true. That might be an opportunity to negotiate with ICE directly about removing the detainer or considering lifting the detainer.

PAULA SCHAEFER: Do you want to follow up?

UNIDENTIFIED SPEAKER: I want to point out it's very easy for ICE to move whatever you file because all they have to do is go get them, and so that really complicates the efforts to try to do something about the detainer. File and serve everybody, you've gone through all this effort, and ICE just comes up and picks them up. So that's one of the big challenges with the detainer issue. And on a case-by-case basis, and I think that's why the class action is so much more helpful, although much more difficult, is because it is so hard to do these case by case. It's on the front end challenging them before they have been given a lot better chance to get the case to actual adjudication.

Also I want to comment on this afternoon, Christina Kleiser, who works in the public defender's office, that's going to be on the last panel, and she's been pushing for the

public defender's office to start — and you guys probably know this because you work with her — to find immigration persons and answer these kinds of questions for public defenders. So this afternoon when she comes, it's a great time to talk to her about how you can support that effort and help her in doing that.

And then one last point I wanted to make, and this is something that the first speaker spoke about at the very beginning, but it's real important from an immigration practice a lot of times you have a hard time convincing people whose relatives have been detained that they can be deported just because they're in the country illegally, regardless of whatever their crime is. But I think on the criminal defense side of this, it's easy to sometimes disregard a good defense on the criminal issues because you think, well, they're going to be deported anyway, they have no status. And *Padilla* was a permanent resident. So it's a different set of rules. In my experience here in Knoxville in this jurisdiction, most of the cases we see are not permanent residents, people with legal status falling into criminal proceedings. Most of the time, the vast majority of time, it's persons with undocumented status. However, if immigration reform happens, that is seriously going to turn all that on its head because there's suddenly a vast number of people who no longer previously had no options who suddenly have some options. And to a small degree, that's already happened because, over the past three or four years, immigration has been directed by the Obama administration to regain a little bit of the prosecutorial discretion that they had foregone in the past, oh, ten or fifteen years. So even in cases that someone is undocumented, there might still be options if they're able to navigate successfully, navigate at a criminal proceeding. So in a limited sense, even if they're undocumented, it still matters, and especially if there's immigration reform, it's really going to matter.

JENNIFER CHACÓN: Yes, I would want to hammer that home. I think, even if there's no immigration reform, you might have someone who is eligible for asylum but might not be eligible for asylum, say, if it's an aggravated felony. You might have someone who is eligible for cancellation of removal but might not be eligible for cancellation of removal if it's the aggravated felony. So someone who is unauthorized may well have serious status issues that are on the line here. And then if comprehensive immigration reform is enacted, things that people are pleading to now may be the kind of decisive factor as to whether they're eligible for that then. And so I think we need to be really thoughtful about what it is that they're pleading to and what the potential consequences are in the shadow of immigration reform. And it's really difficult to know what that means for particular people. And so you just have to kind of keep it in mind as a broad source of information about what you're doing.

PAULA SCHAEFER: I think we're out of time. I know there's still some questions. I would invite people to come up, and hopefully our panelists can talk for a couple of minutes after we wrap up.

But I want to thank all of you. I appreciate you all being here today. It's been a great panel.